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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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**NO. PD-0424-19**

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COURT OF CRIMINAL APPEALS
12/20/2019
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**IN THE**

**COURT OF CRIMINAL APPEALS OF TEXAS**

**AUSTIN, TEXAS**

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**LARRY THOMAS CHAMBERS, JR.,**
**Petitioner**

**vs.**

**THE STATE OF TEXAS,**
**Respondent**

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**On Review from the Court of Appeals for the Sixth District of Texas**
**Court of Appeals No. 06-18-00244-CR**
**An Appeal from the 26th Judicial District Court, Williamson County, Texas**
**Trial Court No. 17-0683-K277**

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# STATE'S BRIEF ON DISCRETIONARY REVIEW

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## IDENTIFICATION OF THE PARTIES

Pursuant to Texas Rule of Appellate Procedure 38.2(a)(1)(A), the State supplements the list of the names of interested parties, as follows:

Attorneys for the Appellant

- Mr. Kevin Stryker (on direct appeal), Attorney at Law, 1811 North Austin Ave., Suite 204 Georgetown, Texas 78626.

Attorneys for the State

- Hon. Shawn W. Dick, Williamson County District Attorney, 405 Martin Luther King Street, Box 1, Georgetown, Texas 78626.

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**IN THE**

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**THE STATE OF TEXAS,**
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# STATE'S BRIEF ON DISCRETIONARY REVIEW

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**TO THE HONORABLE COURT OF CRIMINAL APPEALS:**

**COMES NOW**, Respondent, the **STATE OF TEXAS**, by and through the Williamson County District Attorney, the Honorable Shawn W. Dick, and, pursuant to Rules 38.2 and 70.2 of the Texas Rules of Appellate Procedure, files this, its State's Brief on the merits on Discretionary Review in the above-styled and -numbered cause of action, and in support thereof, would show this Honorable Court as follows:

## STATEMENT REGARDING ORAL ARGUMENT

This Court has previously announced that oral argument will not be permitted.

## STATEMENT OF FACTS

At approximately 10:45 p.m. on April 1, 2017, Round Rock Police Sergeant Sam Connell observed a pick-up truck operating on the highway frontage road that did not appear to have a rear license plate as required by law, 7 R.R. at 82-83. *See* Tex. Transp. Code §§ 504.943, 547.322. Officer Connell activated his overhead lights to initiate a traffic stop, but the vehicle did not immediately pull over. 7 R.R. at 84. Rather, the driver—later determined to be Petitioner/Appellant Larry Chambers (hereinafter "Appellant")—continued driving for approximately one-quarter of a mile before he finally stopped. 7 R.R. at 85. At one point while he was following Appellant's vehicle, Officer Connell observed Appellant place his left hand outside of the driver's side window. 7 R.R. at 88-89. At that point, Connell activated his air horn siren 7 R.R. at 129, but Appellant still did not pull over. SX 3; 7 R.R. at 129. Finally, after passing other parking lots and businesses Appellant pulled into a restaurant parking lot. 7 R.R. at 84-85. Connell testified that he considered Appellant's failure to timely stop to be unusual. 7 R.R. at 138.

After he stopped, Appellant immediately began exiting the vehicle. 7 R.R. at

100. Connell testified that this action seemed unusual to him as well. 7 R.R. at 100. Because Appellant had already failed to respond to Connell's lights and siren, the officer had "very grave cause for concern towards what his actions may or may not be at that point, what his intent might be." 7 R.R. at 92. In other words, Connell became concerned for his safety.

By the time Appellant pulled over, another officer had arrived at the scene. SX 3. The officers unholstered their side-arms and ordered Appellant to stay in the vehicle and put his hands on the steering wheel. SX 3; 7 R.R. at 98, 100. Appellant complied, but then briefly lowered his right hand out of view. 7 R.R. at 101. It was later discovered that a loaded pistol, with the hammer cocked, was laying in the seat in the area where Appellant had moved his hand. 7 R.R. at 108-110. Two more officers arrived at the scene shortly thereafter.

One of the officers, Ryan Wilson, found several "shards" of a substance in Appellant's pockets while he was checking him for weapons. 7 R.R. at 182. A field test indicated that the substance was likely to be methamphetamine. 7 R.R. at 117-118. Another officer, Lauren Weaver, saw a pistol butt and a small baggy of what she suspected to be narcotics inside Appellant's truck. 7 R.R. at 160.

After Appellant was removed from the vehicle, Sergeant Jeff Koop heard a crunching sound under his feet and looked down. 7 R.R. at 150. When he did, he

found another baggy containing a substance that appeared to be narcotics on the ground immediately outside the driver's side door of Appellant's vehicle. 7 R.R. at 150. A second loaded pistol was found under the driver's seat. 7 R.R. at 161.

Appellant was arrested and subsequently indicted for possession of four grams or more, but less than 200 grams, of a penalty group 1 controlled substance. C.R. at 34. *See* Tex. Health & Safety Code § 481.115(d). At trial, a chemist for the Texas Department of Public Safety's Austin crime laboratory testified that the substances submitted from Appellant's arrest proved to contain methamphetamine and that the aggregate weight of all of the substances was 5.42 grams. 7 R.R. at 207. The jury found Appellant guilty of the offense charged in the indictment. C.R. at 115. At the sentencing phase of trial, the jury imposed a sentence of twenty years' imprisonment. C.R. at 126. Appellant appealed the judgment and sentence. The Sixth Court of Appeals affirmed the trial court's judgment and sentence. *Chambers v. State*, 06-18-00090-CR, 2019 WL 1412230, at *10 (Tex. App.—Texarkana Mar. 29, 2019, pet. granted) (mem. op., not designated for publication).

## SUMMARY OF ARGUMENT

Appellant Chamber's sole ground before this Court is that the trial court erred in denying him a jury instruction pursuant to Article 38.23 of the Texas Code of Criminal Procedure. Appellant argues he was entitled to a 38.23 instruction because the evidence herein demonstrated that Officer Connell was mistaken about the absence of a license plate on Appellant's vehicle. The State responds by asserting that the trial court did not err in denying said jury instruction because an Article 38.23 instruction was not required unless there was evidence creating "a genuine dispute" about whether Officer Connell's mistake was unreasonable or that he was lying about his observation. No such evidence is found in the record.

## ARGUMENT & AUTHORITIES

**Response to Ground One – Appellant was not entitled to an instruction pursuant to Article 38.23 of the Code of Criminal Procedure because there was no evidence creating "a genuine dispute" about whether Officer Connell's mistake of fact was unreasonable or that he was lying about his observation.**

In his sole issue before this Court, Appellant argues that the trial court erred when it denied Appellant a jury instruction pursuant to Article 38.23 of the Texas Code of Criminal Procedure. The State responds by asserting that the trial court did not err in denying said jury instruction because Appellant failed to demonstrate any disputed issue of fact that would entitle him such an instruction.

## A. The law concerning Article 38.23 instructions.

A defendant's right to the submission of jury instructions under Article 38.23(a) is limited to disputed issues of fact that are material to his claim of a constitutional or statutory violation that would render evidence inadmissible. *Pierce v. State*, 32 S.W.3d 247, 251 (Tex. Crim. App. 2000) (jury instruction can operate "only if there is a contested issue of fact about the obtaining of the evidence... . There is no issue for the jury when the question is one of law only."); *see also* Tex. Code Crim. Proc. Art. 38.23(a). This Court has previously explained:

> The terms of the statute are mandatory, and when an issue of fact is raised, a defendant has a statutory right to have the jury charged accordingly. The only question is whether under the facts of a particular case an issue has been raised by the evidence so as to require a jury instruction. Where no issue is raised by the evidence, the trial court acts properly in refusing a request to charge the jury.

*Murphy v. State*, 640 S.W.2d 297, 299 (Tex. Crim. App. 1982) (citations omitted).

There are three requirements that a defendant must meet before he is entitled to the submission of a jury instruction under Article 38.23(a): (1) The evidence heard by the jury must raise an issue of fact; (2) the evidence on that fact must be affirmatively contested; and, (3) that contested factual issue must be material to the lawfulness of the challenged conduct in obtaining the evidence. *Madden v. State*, 242 S.W.3d 504, 510 (Tex. Crim. App. 2007).

There must be a genuine dispute about a material fact. *Garza v. State*, 126 S.W.3d 79, 85 (Tex. Crim. App. 2004) (noting that "an Article 38.23 instruction must be included in the jury charge only if there is a factual dispute about how the evidence was obtained"). If there is no disputed factual issue, the legality of the conduct is determined by the trial judge alone, as a question of law. *See e.g.*, *id.* at 87 (defense attorney's allusions on cross-examination and during closing argument that officers violated the sheriff's department inventory-search guidelines and actually began search to look for drugs did not raise a fact issue and "cannot be seen as any more than an opinion or unsupported allegation"); *Wesbrook v. State*, 29 S.W.3d 103, 121 (Tex. Crim. App. 2000) (noting that "a trial court is required to include an Article 38.23 instruction in the jury charge only if there is a factual dispute as to how the evidence was obtained. In the instant case, there was no dispute as to the facts surrounding the acquisition of [witness's] testimony. The only determination to be made in this case was of a legal nature, not factual.") (citation omitted). And if other facts, not in dispute, are sufficient to support the lawfulness of the challenged conduct, then the disputed fact issue is not submitted to the jury because it is not material to the ultimate admissibility of the evidence. *Madden*, 242 S.W.3d at 510. The disputed fact must be an essential one in deciding the lawfulness of the challenged conduct. *See id.* at 511 (*quoting* 40 George E. Dix & Robert O.

Dawson, Texas Practice: Criminal Practice and Procedure § 4.194, at 284 (2nd ed. 2001) ("Jury submission, then, is only required when facts are raised that are necessarily determinative of the admissibility of the challenged evidence.")).

**B. Appellant was not entitled to an instruction.**

Appellant argues that he was entitled to a 38.23 instruction because the evidence herein demonstrated that the officer was mistaken about the presence of a license plate on Appellant's vehicle. However, even where an officer is mistaken about a historical fact, an Article 38.23 instruction is not necessarily required. *Robinson v. State*, 377 S.W.3d 712, 720 (Tex. Crim. App. 2012). Rather, "[a] police officer's reasonable mistake about the facts may yet legitimately justify his own conclusion that there is probable cause to arrest or reasonable suspicion to detain." *Id*.; *see also Madden*, 242 S.W.3d at 516 ("The real factual issue is whether Trooper Lily *reasonably believed* that appellant was acting in a nervous manner, not whether the videotape *shows* appellant acting in a nervous manner."). In such instances, "a mistake about the facts, if reasonable, will not vitiate an officer's actions in hindsight so long as his actions were lawful under the facts as he *reasonably*, albeit mistakenly, *perceived* them to be." *Id*. at 720–21 (emphasis added). In such instances, an Article 38.23 instruction is not required unless "there is a dispute about whether a police officer was genuinely mistaken, or was not telling the truth, about a material

historical fact upon which his assertion of probable cause or reasonable suspicion hinges." *Id*. at 721. Thus, even though Appellant's vehicle did have a required license plate, an Article 38.23 instruction was not required unless there is evidence creating "a genuine dispute" about whether Officer Connell's mistake was unreasonable or that he was lying about his observation. *See Madden*, 242 S.W.3d at 510; *Robinson*, 377 S.W.3d at 720–21.

Officer Connell testified that, from his vantage point, he did not see a license plate on the rear of Appellant's truck. 7 R.R. at 83, 92, 96, 122. The evidence was also uncontested that Appellant's vehicle did have a faded, expired, temporary plate displayed in a location that was not illuminated. 7 R.R. at 121-122, 125-126, 141-142. As noted in the opinion below, the Court of Appeals reviewed the dash-cam recording from Connell's police vehicle and noted that the high degree of glare in the video made it difficult to see the license plate that was eventually discovered on the left side of the bumper. SX 2 and 3. *Chambers*, 2019 WL 1412230, at *4. However, two photographs depicting the rear of Appellant's vehicle were introduced into evidence. SX 6 and 7. Both appear in black and white in the appellate record and were taken in a well-illuminated environment (perhaps a lighted garage or storage facility) to show what the rear of Appellant's vehicle looked like in the light. 7 R.R. at 140. The Court of Appeals estimated that one photo was taken from a

distance of perhaps four to five feet, while the other photo was taken from a much closer vantage, just inches from the plate. SX 6 and 7. *Id*., at *6. These descriptions and estimates of distance in the photos appear accurate and reasonable to the State. While this evidence might arguably create a dispute about whether the license plate was or was not visible in a well-lit garage and from close distance, it does not create a factual dispute about whether it was visible at the time and under the circumstances in which Connell made his decision to stop Appellant. Thus, there is no evidence demonstrating that Officer Connell's conclusion that the vehicle did not have a license plate was unreasonable.[1]

Next, the State asserts that there is no evidence in the record which would create a disputed fact question as to whether Connell was untruthful in his testimony.[2] In order "[t]o raise a disputed fact issue warranting an Article 38.23(a) jury instruction, there must be some affirmative evidence that puts the existence of that fact into question." *Madden*, 242 S.W.3d at 513. In *Madden*, the trooper testified

[1] Appellant claims that the Court of Appeals misunderstood the requirements for an article 38.23 instruction and did not address whether Officer Connell's belief was reasonable. (Appellant's Brief on P.D.R., p. 7). Appellant is clearly mistaken. The Court of Appeals did address both the reasonableness and the truthfulness of Officer Connell's belief. *Chambers*, 2019 WL 1412230, at *5-6.

[2] As the Court of Appeals noted below, it is conceivable that an officer's testimony might be reasonable but also untruthful. Thus, merely because the officer's testimony is reasonable does not automatically mean the officer's testimony was truthful. The Court of Appeals went on to consider address both the reasonableness and the truthfulness of the officer's testimony. *Chambers*, 2019 WL 1412230, at *5-6.

that he stopped Madden for speeding, having registered his speed at sixty-one mph on radar. In the officer's recording of the traffic stop, however, Madden was heard saying that he had his cruise control set at fifty-five mph. The Court of Criminal Appeals held that Madden's speed was a disputed fact that had to be submitted to the jury. *Id*. at 513-14. Nevertheless, in *Madden*, there was evidence disputing the facts existing *at the time the trooper made his decision to initiate a traffic stop*. In the present case, Appellant points to facts existing *after Officer Connell made his decision to initiate the traffic stop and under conditions different* from those existing when Connell made that decision.

Essentially, Appellant argues that, because the vehicle did, in fact, have a license plate, and because that plate was visible in photos taken in a well-lit garage after Appellant had been arrested (SX 6 and 7), a jury could infer that Officer Connell was lying when he testified that he did not see the license plate at the time he decided to stop Appellant. Yet, Officer Connell was consistent in his position that he did not see a license plate, and no other witness testified that the plate was visible at the time Connell made his decision to stop Appellant. 7 R.R. at 83, 92, 96, 122. Furthermore, due to the fact that the plate on Appellant's vehicle was not illuminated and was a non-reflective paper plate, and further due to the nighttime glare, the paper tag is not visible in the dash-cam recording taken at the time when Connell elected

to stop Appellant. SX 3. Moreover, the photographs showing the paper license plate in a well-lit garage, after Appellant was arrested, do not reflect the circumstances existing at the time Officer Connell stopped Appellant. Accordingly, Appellant's argument that Connell was being untruthful is mere speculation.[3] Thus, there is no evidence creating a genuine issue of fact that Connell was not truthful about the basis for his reasonable suspicion. *See Foster v. State*, 814 S.W.2d 874, 884 (Tex. App.—Beaumont 1991, pet. ref'd), *abrogated on other grounds by Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991) (holding that existence of paper license plate inside tinted rear window did not create fact question justifying article 38.23 instruction because the fact "that appellant's vehicle did display a paper dealer's license plate [wa]s not in dispute, but neither [wa]s the fact that both officers did not initially see it displayed inside the vehicle's tinted rear window").

Consequently, this Court should find that the trial court did not err in refusing Appellant's request for an article 38.23 instruction, and the Court of Appeals did not err in affirming the trial court's ruling.

[3] Appellant's cross-examination of Connell did not, and could not, create a disputed fact issue. *See Madden*, 242 S.W.3d at 513-15.

### C. Appellant Did Not Request an Instruction on a Disputed Fact.

Finally, the State would note, in the alternative, that even should this Court determine that Appellant was entitled to a 38.23 instruction, Appellant failed to request an appropriate instruction regarding a specific historical fact or facts. The jury decides facts; the judge decides the application of the law to those facts. *See* Tex. Code Crim. Proc. Art. 36.13 ("Unless otherwise provided in this Code, the jury is the exclusive judge of the facts, but it is bound to receive the law from the court and be governed thereby.").

In this case, Appellant requested a jury instruction dealing with his stop and detention by Officer Connell. C.R. at 117-118. This requested instruction was wholly incorrect. *Madden*, 242 S.W.3d at 511. It did not ask the jury to decide a disputed issue of historical fact. It asked the jury to decide a question of law—whether Officer Connell had "reasonable suspicion" to detain Appellant. C.R. at 117-118. "Reasonable suspicion," in this context, is not the type of suspicion, hunch, or notion that the ordinary person might have. Rather, it is a legal term of art. *Id*. The jury, however, is not an expert on legal terms of art or the vagaries of the Fourth Amendment. *Id*. It cannot be expected to decide whether the totality of certain facts do or do not constitute "reasonable suspicion" under the law. *Id*. That would require a lengthy course on Fourth Amendment law. Even many experienced lawyers and

judges disagree on what constitutes "reasonable suspicion" or "probable cause" in a given situation. It is the trial judge who decides what quality and quantum of facts are necessary to establish "reasonable suspicion." *Id*. Only if one or more of those necessary facts are disputed does the judge ask the jury to decide whether the it believes that disputed facts actually occurred. *Id*.

Looking just at Appellant's requested jury instruction, neither the trial judge, nor this Court could have any idea of what specific fact or facts Appellant believed were in dispute. In his Brief to this Court, Appellant claims that the facts that Officer Connell relied upon to establish "reasonable suspicion" were not reasonable. But when the trial judge asked appellant to tell her precisely what facts he thought were in dispute, he focused not on what the officer saw or did not see; but rather, he focused primarily on what the officer could have seen or should have seen. 8 R.R. at 13. The trial court found that there was no dispute of fact.

> All right. Mr. Stark, while I tend to usually try to include everything in a jury charge because I'd rather err on the side of caution since the most overturned -- things that are most overturned are based on a charge, I'm not sure in this case we get to that point because I don't think the actual issue at dispute is actually whether -- I think that the officer testified he didn't see it, and there's a video, and I think the jury can sort of do what they want with that.
>
> * * * * *
>
> I don't -- I do think, though, that the only -- that I don't really think there's a disputed issue of fact. I think it's a disputed issue of law, which

> was decided by me yesterday. So I am not going to include the charge, and I will note your objection.

8 R.R. at 16-17.

The trial judge was correct. What Appellant wanted was a jury instruction on whether the totality of facts that Officer Connell listed constituted "reasonable suspicion" under the Fourth Amendment. Appellant's proposed instruction focused only on the law. It did not set out any specific, disputed historical fact that the jury was to focus upon and then decide. Appellant's trial counsel merely argued that the issue raised was whether or not this was a lawful stop. Appellant was not entitled to his requested instruction because the jury cannot make the legal determination of whether certain facts do or do not constitute a lawful stop. *See Garza*, 126 S.W.3d at 86 ("That appellant 'disagrees with the conclusion that probable cause was shown as a matter of law' is not the same as appellant controverting the facts. ... The question of whether the search was legal is a question of law, as none of the circumstances surrounding the search were controverted by appellant."). Because Appellant never presented a proposed jury instruction that asked the jury to decide disputed facts, error in the charge, if any, should be reviewed only for "egregious harm" under *Almanza*. *See Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). Nevertheless, the State maintains there was no error at all because there was no conflict in the evidence that raised a disputed fact issue material to the legal

question of "reasonable suspicion" to detain him, and therefore, Appellant was not entitled to an Article 38.23 instruction.

## PRAYER

**WHEREFORE, PREMISES CONSIDERED**, the State of Texas prays that this Court will affirm the judgment and opinion of the Sixth Court of Appeals which affirmed the judgment of the trial court.

Respectfully Submitted,

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By: */s/ René B. González*
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## CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4, I hereby certify that this document contains 3,871 words (excluding the cover, table of contents and table of authorities). The body text is in 14-point font, and the footnote text is in 12-point font.

*/s/ René B. González*
René B. González

## CERTIFICATE OF SERVICE

Pursuant to Tex. R. App. P. 9.5, I certify that a copy of the foregoing State's Brief on Discretionary Review was electronically served upon Petitioner's counsel of record, Mr. Keith S. Hampton, Attorney at Law, 7000 North Mo Pac Expressway, Suite 200, Austin, Texas 78731, at keithshampton@gmail.com, and upon the Office of the State Prosecuting Attorney, Post Office Box 13046 Austin, Texas 78711-3046, at information@spa.texas.gov , on the 18th day of December, 2019.

*/s/ René B. González*
René B. González